Service Date: October 14, 2004

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF MACKENZIE DISPOSAL, INC. and WWSS ASSOCIATES, PSC 9265, Complaint by Montana Solid Waste Contractors and Browning-Ferris Waste Systems of Montana	))))))	TRANSPORTATION DIVISION DOCKET NO. T-00.4.COM FINAL ORDER No. 6492d

APPEARANCES

FOR MACKENZIE DISPOSAL, INC.
JEROME ANDERSON,
Attorney at Law
Anderson & Baker
P.O. Box 866
Helena, MT 59624

FOR MONTANA SOLID WASTE CONTRACTORS, INC.
G. STEVEN BROWN
Attorney at Law
1313 Eleventh Avenue
Helena, MT 59601

FOR BROWNING-FERRIS WASTE SYSTEMS OF MONTANA
FRANK C. CROWLEY
Attorney at Law
Doney, Crowley, Bloomquist & Uda
44 West Sixth Avenue
Helena, MT 59601

COMMISSION STAFF

MR. MARTIN JACOBSON, ESQ.[1]
Attorney, Legal Division
Montana Public Service Commission
1701 Prospect Avenue
Helena, MT 59620-2601

[1] Mr. Martin Jacobson appeared for the Public Service Commission on January 29, 30, and 31, 2003. Subsequently, at the request of complainants, Mr. Jacobson recused himself from further participation in the proceeding as a representative of the Public Service Commission.

MR. AL BROGAN, ESQ.[2]
Attorney, Legal Division
Montana Public Service Commission
1701 Prospect Avenue
Helena, MT 59620-2601

BEFORE

Jay Stovall, Commissioner and Hearing Examiner

PROCEDURAL BACKGROUND

1. In August 1999, MacKenzie Disposal, Inc. ("MacKenzie") and WWSS Associates, Inc. dba Big Sky Industrial ("WWSS") filed an application for approval of transfer of Class D motor carrier authority, Certificate No. 9265 ("Certificate") with the Commission. On September 22, 1999, Browning-Ferris Waste Systems of Montana ("BFI") filed a protest to the proposed transfer on the grounds that (1) Dennis Johnston, husband of Cherie Johnston, was bound by a covenant not to compete; (2) MacKenzie was not a corporation in good standing with the Montana Secretary of State, (3) MacKenzie would not be able to use the Certificate for MacKenzie's intended purpose. On September 29, 1999, MacKenzie filed a Motion to Dismiss the Protest of BFI. On October 25, 1999, by Notice of Commission Action Dismissing Protest, the Commission granted MacKenzie's motion. On November 22, 1999, by Notice of Commission Action, the Commission notified the parties that on November 15, 1999, it had approved the transfer of the Certificate.

2. On January 14, 2000, Montana Solid Waste Contractors, Inc. ("MSWC") and BFI ("MSWC/BFI") filed a complaint against MacKenzie with the Commission; on January 31, 2000, MSWC/BFI filed an amended complaint challenging the validity of the

[2] Mr. Al Brogan appeared for the Public Service Commission on September 3, 4, and 5, and October 30, 2003.

Certificate. The Commission discerned that MSWC/BFI interpreted ARM 38.3.130 differently that it did. On March 16, 2000, the Commission initiated rulemaking to resolve the conflicting interpretations. On March 23, 2000, the Commission stayed further action in this matter pending the outcome of the rulemaking. On July 27, 2000, the Commission amended ARM 38.3.130 resolving the conflicting interpretations. On October 19, 2000, the Commission issued a proposed order dismissing MSWC/BFI's complaint. MSWC/BFI filed exceptions to the proposed order and supporting briefs. MacKenzie filed a brief in support of the proposed order. On February 5, 2001, the Commission held oral argument on the exceptions. On March 20, 2001, the Commission issued a final order dismissing the complaint of MSWC/BFI.

3. On April 20, 2001 MSWC/BFI filed a petition for judicial review of the final order in the District Court for the First Judicial District in and for the County of Lewis and Clark. On February 15, 2002, the parties entered into and filed a Stipulation for Remand. On that same date the District Court entered an Order of Remand to Public Service Commission.

4. On February 26, 2002, MSWC/BFI filed their Second Amended Complaint for Show Cause Order for Revocation of Class D Certificate No. 9265 Pursuant to ARM 38.3.106 and 38.3.107 ("2nd Amended Complaint").

5. On April 10, 2002, MSWC/BFI and WWSS filed a stipulation and joint motion for dismissal of WWSS from this proceeding. On April 18, 2002, the Commission issued a Notice of Commission Action approving the stipulation and dismissing WWSS from this proceeding.

6. On May 8, 2002, MacKenzie filed an answer to the 2nd Amended Complaint ("Answer"). The parties engaged in protracted discovery. On November 27, 2002, MacKenzie filed a Motion to Dismiss and a Motion in Limine that activities and evidence of activities occurring prior to January 14, 1998 were immaterial, irrelevant and incompetent. On December 2, 2002, MacKenzie file a Second Motion to Dismiss and a Second Motion in Limine asserting that activities and evidence of activities occurring prior to January 14, 1995 were immaterial, irrelevant, and incompetent. On December 2, 2002, MSWC/BFI filed their Consolidated Prehearing Motions and Supporting Brief seeking to (1) exclude consideration of BFI's corporate and financial records, (2) exclude consideration of potential claims among the parties, (3) include Dennis Johnston's covenant not to compete and related correspondence, (4) enter the deposition of Amy Shulund, (5) enter into the record phone records and other documents provided by WWSS, and (6) to compel discovery. On January 13, 2003, MSWC/BFI filed their Consolidated Response to MacKenzie's motions to dismiss and motions in limine. On January 14, 2003, MacKenzie filed its Reply to MSWC/BFI's pre-hearing motions. On January 21, 2003, MacKenzie filed its Reply to MSWC/BFI's response to the motions to dismiss and motions in limine. On January 21, 2003, MSWC/BFI filed their Consolidated Reply to MacKenzie's reply to their prehearing motions.

7. On December 2, 2002, MSWC/BFI filed their Consolidated Proposed Prehearing Order in which they state certain agreed facts. On January 3, 2003, MacKenzie filed its Proposed Prehearing Order in which it approved the agreed facts as represented by MSWC/BFI, but reserved the right to object to their admissibility on relevancy or other grounds.

8. The Commission held a hearing and received testimony and evidence in this matter in Billings, Montana on January 29, 30, and 31, 2003, and in Helena, Montana on September 3, 4, and 5, and October 30, 2003. At the hearing, MacKenzie's motions to dismiss were denied, Tr. at 20, and the motions in limine were taken under advisement. *Id.* at 20-21.

9. On December 16, 2003, MSWC/BFI filed (1) Brief in Support of Complainants' Consolidated Proposed Findings of Fact and Conclusions of Law, (2) Proposed Findings of Fact, Conclusions of Law, and (3) Memorandum of Law[3] ("MSWC/BFI Br."), and MacKenzie filed (1) Brief of Respondent MacKenzie Disposal Inc., and (2) Proposed Findings of Fact, Conclusions of Law, and Proposed Order ("MacKenzie Br."). On January 20, 2004, MSWC/BFI filed (1) Complainants' Post-hearing Consolidated Response Brief ("MSWC/BFI Resp.") and (2) Joint Motion to Take Judicial Notice of Documents and Admit them into Evidence; MacKenzie filed Brief and Reply to Complainants' Opening Brief and Proposed Findings of Fact and Conclusions of Law ("MacKenzie Resp").

PRELIMINARY LEGAL ISSUES

I. Effect of Violation of Rules, Orders or Statutes

10. MSWC/BFI allege that the holders of the Certificate have violated Commission rules and Montana statutes. A key factor in resolving this issue is the effect of the alleged violations on the status of the Certificate in the absence of Commission

[3] At the conclusion of the hearing, the parties were specifically requested to brief seven certain issues. Tr. at 1606-1608. MSWC/BFI chose to address all of four issues and part of a fifth issue in a Memorandum of Law rather than their brief. The Commission does not condone this treatment of the Hearing Officer's request and cautions counsel about such future behavior. Nevertheless, in the interest of fairness, the Commission has considered MSWC/BFI's positions on the issues addressed in the Memorandum of Law as if they had been addressed in their brief.

action to impose any penalty, suspension, or revocation pursuant to § 69-12-210, MCA. If penalty, forfeiture, suspension, cancellation, or revocation is self-executing, then the Commission must determine if the events causing such self-executing action occurred. If penalty, forfeiture, suspension, or revocation is not self-executing, then a motor carrier's operating certificate is valid until revoked or cancelled by the Commission.

11. A thing is self-executing if it is effective immediately without the need for intervening implementing action by anyone. *See Black's Law Dictionary* 1360 (6th ed. 1990).[4] Under Montana law, penalty statutes are not self-executing. *47 Op. Att'y Gen. No. 21* (Mont. 1998), (*citing Crane v. State*, 200 Mont. 280, 284, 650 P.2d 794, 797 (1982), (interpreting statute imposing penalties on person who violates provision of chapter requiring licensure of plumbers in certain situations)). None of the penalty statutes, § 69-12-108, 210, and 327, MCA, are self-executing.

12. Property rights associated with a certificate of operating authority are created by state law. *See Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548, 561 (1972). A legislature may condition the retention of a property right on reasonable conditions that indicate a present intention to retain the interest. *Texaco, Inc. v. Short*, 454 U.S. 516, 526, 102 S. Ct. 781, 791, 70 L. Ed. 2d 738, 749 (1982). When the retention of a property right is so conditioned, the failure of the condition results in termination of the property right without further action. *See United States v. Locke*, 471 U.S. 84, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (holding that under the Federal Land Policy and Management Act of 1976 unpatented mining claims were extinguished when owners thereof failed to timely make a required filing); *Texaco, Inc.*,

[4] "Self-executing. Anything (*e.g.*, a document or legislation) which is effective immediately without the need of intervening court action, ancillary legislation, or other type or implementing action."

454 U.S. 516, 102 S. Ct. 781, 70 L. Ed. 2d 738 (1982) (holding that under the Indiana Dormant Mineral Interests Act severed mineral interests reverted to the surface owner when the owner had failed to use the interest for twenty years and to timely file a statement of claim).

13. Has the legislature conditioned the retention of a certificate of operating authority on reasonable conditions indicating an intention to retain the interest? Four statutes are at issue: §§ 69-12-210, 314, 323, and 327, MCA. The first provides in pertinent part, "[f]ollowing an opportunity for hearing and upon a finding that a motor carrier has violated any of the commission's rules or orders or any provision of this chapter, the commission may suspend or revoke the motor carrier's certificate of operating authority or impose any penalty provided for under 69-12-208." § 69-12-210, MCA.[5] The second provides in pertinent part, "[a] motor carrier may not possess a Class D motor carrier certificate or operate as a Class D motor carrier unless the motor carrier actually engages in the transportation of garbage on a regular basis as part of the motor carrier's usual business operation." § 69-12-314(2), MCA. The pertinent portion of the third provides, "[w]hen a certificate has once been issued to a motor carrier as provided in this part, such certificate shall continue in force until terminated by the commission for cause as herein provided or until terminated by the owner's failure to comply with 69-12-402." § 69-12-323(3), MCA. The fourth dictates the procedure the Commission is to follow to revoke a certificate for cause.[6]

[5] This section also gives the Commission jurisdiction to investigate and hear complaints. BFI assert that the Complaint in this action was filed under this section.

[6] "**69-12-327. Revocation of certificate – right of review.** (1) If it appears that a certificate holder is violating or refusing to observe any of the commission's orders or rules or any provision of Title 69, as amended, the commission may issue an order to the certificate holder to show cause why the certificate should not be revoked. If the certificate holder fails to appear to show cause as ordered by the commission,

14. Analysis of the above cited statutes reveals the legislature understood the difference between a self-executing termination and one requiring action by the Commission. The legislature specifically provided that violation of § 69-12-402 caused a self-executing termination.[7] The legislature further provided that the only other method of termination was by an action of the Commission for cause. Finally, the legislature specifically dictated the process the Commission is to use to revoke a certificate. The legislature did not condition retention of a Class D certificate on a reasonable condition.

15. The legislature did not make § 69-12-314(2), MCA, self-executing, although it could have done so. The inescapable conclusion is that § 69-12-314(2) does no more than provide the Commission with a specific "cause", applicable to Class D motor carriers only, for which a certificate may, in the Commission's discretion, be revoked.

16. This result is consistent with the Interstate Commerce Commission's treatment of similar certificates. *See e.g., Smith Brothers, Revocation of Certificate,* 33 M.C.C. 465 (1942) (". . .irrespective of the self-executing forfeiture term or condition in

---

the certificate may be revoked without a hearing. If the holder does appear to show cause, the commission may:

(a) dismiss the proceeding, notifying the holder that the certificate is not revoked; or

(b) hold a hearing on the question of revocation, notifying the holder of the time and place for the hearing." § 69-12-327(1), MCA.

[7] "**69-12-402. Compliance with commission rules.** No certificate shall be issued or remain in force unless the holder thereof shall comply with such rules of the commission as it shall adopt governing the filing of bonds, policies of insurance, or such security or agreement in such form and adequate amount as the commission may require for:

(1) the prompt payment of all compensation or fees due the state under the provisions of this chapter; and

(2) the payment of any final judgment which may be rendered against any such motor carrier arising out of the death of or injury to any passenger or injury to other person or property as a result of any negligent operation of the motor vehicles or such motor carrier, with power in the commission whenever, in its opinion, the financial ability of the motor carrier warrants." Violation of this section is not an issue in this proceeding.

respondents' certificate, the certificate continues in full force and effect unless and until terminated by us in accordance with the provisions in [applicable federal statute]").

II. Motions in Limine/Statute of Limitations

17. MacKenzie filed two motions in limine. On November 27, 2002, MacKenzie filed a motion to exclude evidence of all activities and matters specifically concerning the Certificate which occurred prior to January 14, 1998; on December 2, 2002, MacKenzie filed a motion to exclude evidence of all activities and matters specifically concerning the Certificate which occurred prior to January 14, 1995. The first motion was based on the two-year statute of limitations set forth in § 27-2-211, MCA; the second motion was based on the five-year statute of limitations in § 27-2-231, MCA.

18. In the first instance MacKenzie asserted the purpose of this action was to effect a cancellation of the Certificate, that such a cancellation would be a forfeiture, and that § 27-2-211, MCA, applies.[8] In the second instance MacKenzie asserted that, if § 27-2-211, MCA, did not apply, then the catch-all statute of limitations, § 27-2-231, MCA, applies.[9]

19. MSWC/BFI responded that MacKenzie's motions were directly contrary to the express terms of the Stipulation for Remand and the District Court Order for Remand that incorporated the Stipulation for Remand by reference. MSWC/BFI also responded that § 27-2-211, MCA, does not apply because (1) the statute granting the

[8] § 27-2-211, MCA, provides in pertinent part, "Within 2 years is the period prescribed for the commencement of an action upon: (a) a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state, except when the statute imposing it prescribes a different limitation; . . . (c) a liability created by statute other than (i) a penalty or forfeiture; . . . ."

[9] § 27-2-231, MCA, provides, "An action for relief not otherwise provided for must be commenced within 5 years after the cause of action accrues."

Commission authority to revoke a certificate or impose a penalty, § 69-12-210, MCA, does not give an action to an individual or to an individual and the state; (2) an action under § 69-12-210, MCA, is not an action for a forfeiture; and (3) § 69-12-210, MCA, is a regulatory statute representing an exercise of police power to protect the public health, safety, and welfare, and as such is not subject to a statute of limitations. MSWC/BFI further responded that even if § 27-2-211, MCA, applies, the limitations period did not begin to run until the latter half of 1999 and had not run when this action was filed.

20. With respect to § 27-2-231, MCA, MSWC/BFI reasserted that no statute of limitations can override the Stipulation for Remand, that no statute of limitations applies, and asserted that if the Commission applies a statute of limitations it must apply the longest period of limitation.

21. In reply, MacKenzie asserted that in this action MSWC/BFI seek to have the Commission revoke the Certificate – an action by an individual and the state, the Certificate is a property right or franchise and to lose such a right is to forfeit such right. MacKenzie maintained that this combination made it clear that this case involved a request by an individual for a forfeiture to be accomplished by the state and was squarely within § 27-2-211. MacKenzie further replied that nothing in the Stipulation for Remand denied it the right to assert its available defenses, the statute of limitations was properly pleaded by MacKenzie, and thus the motions in limine do not contradict either the Stipulation for Remand or the Order for Remand. Finally, MacKenzie asserted that BFI (the company), through its personnel, knew of the alleged non-use of the Certificate in 1988, and that the cause of action accrued no later than then.

22. The Hearings Officer took the issue of the statute of limitations under advisement, agreed to receive evidence that might relate to events outside of an applicable limitations period, and stated that if a statute of limitations had a bearing on the action no harm would be done by receiving the evidence. Tr. at 20-21. The evidence sought to be excluded was received. Therefore, the Motions in Limine are deemed denied. However, the parties' briefs on the Motions in Limine, along with subsequent briefing, are pertinent to the Commission's consideration of the statute of limitations issue and are considered in that context. In its initial brief MacKenzie addressed this issue further. MacKenzie did not introduce any new argument or rationale with respect to this issue. MacKenzie Br. at 29-32. In their response MSWC/BFI reassert their previous arguments and introduce authorities applying the principle of "*nullum tempus occurit regi*."[10] MSWC/BFI Resp. at 18-19.

23. Actions by and before the Commission are subject to a statute of limitations. The Commission is specifically granted jurisdiction to hear complaints regarding a motor carrier's compliance with its rules, orders, or Title 69, Chapter 12, MCA. Section 69-12-210, MCA, provides, "(1) The commission has jurisdiction to conduct investigations and hear complaints to determine whether a motor carrier has violated any of the commission's rules or orders or any provision of this chapter." However, limitations on a court's jurisdiction to hear cases are equally applicable to the Commission's jurisdiction to hear complaints. The statute of limitations is a jurisdictional issue. *See e.g., State v. Larson*, 240 Mont. 203, 205, 783 P.2d 416, 417

[10] "*Nullum tempus occurrit regi"* literally means time does not run against the king. It refers to the principle that statutes of limitations do not run against a sovereign. *Black's Law Dictionary* 1068 (6th ed. 1990).

(1989); *Milanovich v. Milanovich*, 201 Mont. 332, 334, 655 P.2d 963, 964 (1982), *aff'd after remand*, 215 Mont. 367, 697 P.2d 927 (1985).

24. The principle of "*nullum tempus occurit regi*" does not apply. Section 2-27-103. MCA, provides that statutes of limitations apply to actions by or for the benefit of the state. Statutes of limitations have been routinely enforced against state administrative agencies. *See e.g., Caterpillar Tractor Co. v. Department of Revenue*, 194 Mont. 537, 545, 633 P.2d 618, 623-4 (1981). The cases cited by MSWC/BFI are from jurisdictions that have not explicitly extended the application of statutes of limitations to the governmental authority, and are inapplicable.

25. Having determined that a statute of limitations applies, the Commission must then determine which limitation period is applicable. As explained above, MacKenzie argues that a two-year limitation should apply, while MSWC/BFI argue for a five-year limitation. The Commission determines that both parties are wrong. In deciding which statute of limitations governs, the Commission is guided by the following principles: (1) a specific statute prevails over a general statute, *State v. Feight*, 2001 MT 205, ¶ 21, 306 Mont. 312, 317, 33 P.3d 623, 626 (2001); and (2) a longer period prevails over a shorter period. "Where there is a substantial question as to which of two or more statutes of limitations should apply, the general rule is that the doubt should be resolved in favor of the statute containing the longest limitations. Where doubt exists as to the nature of the action, courts lean toward application of the longer period of limitations. *Thiel v. Taurus Drilling Ltd. 1980-II*, 218 Mont. 201, 212, 710 P.2d 33, 40 (1985), *citations omitted.*

26. The possible statutes of limitations are §§ 27-2-203(3), 27-2-211(1)(a), 27-2-211(1)(c)(i), and 27-2-231, MCA[11]. The first guiding principle and the specific statutory language eliminate § 27-2-231, MCA. By its terms, § 27-2-231, MCA, applies only to "an action for relief not otherwise provided for". Furthermore, this is a residual statute of limitations that applies only when no specific statute is applicable. *See Peterson v. Hopkins*, 210 Mont. 429, 437, 684 P.2d 1061, 1065 (1984). As the other possible statutes are specific statutes, the residual statute cannot apply.

27. Section 27-2-211(1)(a), MCA, applies to actions "upon a statute for a penalty or forfeiture when the action is given to an individual or an individual and the state". MacKenzie argues that revocation or cancellation of a certificate of public convenience and necessity is akin to a penalty or forfeiture, and because the action is a complaint heard by the Commission, it is given to an individual and the state. MacKenzie's argument is not convincing. Section 69-12-210(2), MCA, provides in part, "the commission may suspend or revoke the motor carrier's certificate of operating authority or impose any penalty provided for under 69-12-108." Nothing in this statute gives the action to an individual or an individual and the state. The statute gives the action to the state in the form of the Commission.

28. Section 27-2-211(1)(c)(i), MCA, might apply. This section applies to an action upon a "liability created by statute other than a penalty or forfeiture." "[T]he phrase 'liability created by statute' has a settled meaning in the law of Montana as well as other states. This Court has construed the phrase to mean "'a liability which would not exist but for the statute. . . .'" *Abell v. Bishop*, 86 Mont. 478, 486, 284 P. 525, 528 (1930)

[11] § 27-2-202(3), MCA, provides, "The period for commencement of an action upon an obligation or liability other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years." The text of the other possible statutes is presented in notes 1 and 2 *supra*.

(*quoting* 37 *C.J. Limitations of Actions* § 123). Put differently, the test is whether liability would exist absent the statute in question. *State ex rel. Fallon County v. District Court*, 161 Mont. 79, 81, 505 P.2d 120, 121 (1972). Therefore, a liability created by statute is one which "establishes a new rule of private right unknown to the common law." *Butler v. Peters*, 62 Mont. 381, 384, 205 P. 247, 248 (1922). *See also 51 Am.Jur.2d Limitations of Actions* § 82 (1962)." *Royal Ins. Co. v. Roadarmel*, 2000 MT 259, ¶ 17, 301 Mont. 508, 513, 11 P.3d 105, 108 (2000). There is no liability of MacKenzie that would exist at common law.

29. However, if MacKenzie's assertion that revocation is akin to a penalty or forfeiture is correct, then the statute does not apply. In any event, as discussed below, the second guiding principle requires the Commission to choose the longer limitation period provided for in § 27-2-202(3), MCA.

30. Section 27-2-202(3), MCA, applies to "an action upon an obligation or liability other than a contract, account, or promise, not founded upon an instrument." "Obligation is a legal duty by which one person is bound to do or not to do a certain thing and arises from: . . . (2) operation of law." § 27-1-105, MCA. The gravamen of this action is the compliance by MacKenzie, and possibly its predecessors, with the Commission's rules or orders or provisions of Title 69, Chapter 12, MCA. The obligation of a motor carrier to comply with such rules, orders, and statutes arises from the operation of law. More specifically, the obligation of a Class D motor carrier to engage "in the transportation of garbage on a regular basis" arises from the operation of § 69-12-314(2), MCA. Due to the doubt as to whether the nature of the action is such that

§ 27-2-211, MCA, or § 27-2-202, MCA, should apply, the longer three-year statute of § 27-2-202(3) applies.

31. The Commission determines that in an action under § 69-12-210, MCA, where there is no evidence of concealment of facts by fraud it is limited to considering activities taking place within three years of the date of the filing of a complaint. In this case, the Commission may only consider actions of certificate holders which occurred after January 14, 1997.

III. Administrative Notice

32. As described above, on January 20, 2004, MSWC/BFI filed a Joint Motion to Take Judicial Notice of Documents and Admit them into Evidence ("Notice Motion").[12] Although some refer to notice taken by an administrative agency as "judicial" notice, the Commission prefers "administrative notice" as it does not have judicial powers. The Notice Motion is being treated as a motion for administrative notice,[13] and the standards for administrative notice are substantially identical, although administrative notice is broader than judicial notice. The Commission's authority to take administrative notice of facts and law is provided by §§ 2-4-612, 26-1-Rule 201, 26-10-Rule 202, MCA, and ARM 38.2.4201.

33. Section 2-4-612(2), MCA, provides in pertinent part, "Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence." Section 26-10-Rule 201, MCA, sets forth the

[12] Specifically, MSWC/BFI requested that the Commission take judicial notice of (1) Copy of decision in *Vester Wilson, dba Bitterroot Disposal Services v. Department of Public Service Regulation*, No. 44557 (1st Judicial Dist. Ct. Jan. 31, 1982); (2) Legislative Testimony of Dennis Johnston; (3) Complaint & Jury Demand in *West v. Walsh Constr. Co.*, No. DV 97-1059 (13th Judicial Dist. Ct. *filed* Dec. 4, 1997); (4) Answer in *West v. Walsh Constr. Co.*, No. DV 97-1059 (13th Judicial Dist. Ct. *filed* Nov. 5, 1998); (5) Business record of BFI dated 9/1/93; and (6) Business record of BFI dated 5/1/96.

[13] Although the Notice Motion referred to judicial notice, the proposed order submitted by MSWC/BFI properly referred to administrative notice.

statutory rules regarding judicial notice of facts; § 26-10-Rule 202, MCA, sets forth the statutory rules of evidence regarding judicial notice of law. Section 2-4-612(6), MCA, provides in pertinent part, "Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge." The import of the above-referenced statutes is that (1) when requested and supplied with the necessary information, the Commission must take administrative notice of judicially cognizable facts and law (except the common law, constitutions and statutes of the United States and every state); (2) the Commission may take administrative notice of judicially cognizable facts, generally recognized technical or scientific facts within its specialized knowledge, and law; and (3) the Commission must take administrative notice of the common law, constitutions and statutes of the United States and every state, territory and jurisdiction of the United States. A judicially cognizable fact is one which is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." § 26-10-Rule 201(b), MCA. Law includes "records of any court of this state." § 26-10-Rule 202(b)(6), MCA.

34. The following items are law under § 26-10-Rule 202(b)(6):

A. Decision in *Vester Wilson, dba Bitterroot Disposal Services v. Department of Public Service Regulation*, No. 44557 (1st Judicial Dist. Ct. Jan. 31, 1982);

B. Complaint & Jury Demand in *West v. Walsh Constr. Co.*, No. DV 97-1059 (13th Judicial Dist. Ct. *filed* Dec. 4, 1997); and

C. Answer in *West v. Walsh Constr. Co.*, No. DV 97-1059 (13th Judicial Dist. Ct. *filed* Nov. 5, 1998).

The Commission hereby takes administrative notice of these items. It is not necessary that these items be admitted to the record. The Commission hereby denies that portion of the Notice Motion seeking to have them admitted to the record. The significance of each of these items is not necessarily that described in the Notice Motion. The significance that the Commission attaches to each item is discussed below.

35. The Commission may take administrative notice of facts contained in certain documents, not the documents themselves. The business record of BFI dated 9/1/93 and the business record of BFI dated 5/1/96 are neither generally known within the territory of the Commission's jurisdiction nor capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. The accuracy of business records is often reasonably questioned. The Commission declines to take administrative notice of either of these documents. The Commission notes that these documents, with proper foundation, quite likely could have been admitted as exhibits during the hearing. The request for judicial notice appears to be an attempt by MSWC/BFI to put additional evidence before the Commission. Montana's Supreme Court has strongly disapproved of this tactic.

> Nor is it conceivable that the Franks' counsel, an attorney with some 15 years' experience in the practice of law, did not recognize the impropriety of attaching such nonrecord and totally irrelevant matters to his clients' brief on appeal. In this regard, we have long cautioned counsel about such practices, stating for example that " '*[w]e strongly condemn this practice by counsel for appellants* [of attempting to introduce extraneous evidence by the 'back door' via attachment as appendices to their brief] *and use this occasion to warn other parties to future appeals that this practice will not be tolerated*.' " This practice wastes the time and resources of both opposing counsel and this Court . . . .

Frank v. Harding, 1998 Mont. 215, ¶ 7, 290 Mont. 448, 450, 965 P.2d 254, 255-56 (1998) (internal citations omitted, emphasis and brackets in original).

36. Finally, MSWC/BFI request that the Commission take administrative notice of Legislative Testimony of Dennis Johnston to "assure the Commission of Mr. Dennis Johnston's agreement that competition in Billings does not, *ipso facto* result in public benefit." Notice Motion at p. 2. Dennis Johnston's belief as to the result of competition in Billings is irrelevant to the issues in this proceeding. The Commission declines to take administrative notice of irrelevant items.[14]

IV. Summary of Testimony[15]

CHARMAINE JOHNSTON (aka CHERIE JOHNSTON)

37. Cherie Johnston is the President and owner of MacKenzie. Ms. Johnston testified that she individually incorporated MacKenzie. She testified that she is and, at all times since its formation, has been the sole shareholder and officer of MacKenzie. She testified that no one has an anticipation of a future interest of any kind in MacKenzie. Ms. Johnston testified that Dennis Johnston had no involvement in conceiving of, implementing of, or financing of MacKenzie other than executing a quit claim deed transferring his interest in their house to her. She testified that the circumstances that led to the termination of her employment by BFI were such that she erected a Chinese wall between her business ventures and those of her husband. She further testified that

[14] The Commission has not considered, and does not decide, whether it could properly take administrative notice of legislative testimony if it were relevant.

[15] The hearing transcript in this matter consists of 1,609 pages. Additionally, by agreement of the parties and ruling of the Hearings Officer, depositions of Amy Shulund and Wayne Budt were admitted into the record. Much of the testimony concerned actions of parties and their predecessors occurring prior to January 14, 1997, and matters that are irrelevant to the Commission's deliberation in this proceeding. To the extent possible, the summary of witnesses' testimony (including that contained in the depositions) is limited to those matters which are timely and relevant.

anything Dennis Johnston may have done with the respect to the Certificate was not done for MacKenzie. She testified that she did not ask Dennis Johnston about his opinions of the historical use of the Certificate. Ms. Johnston testified that she agreed that when Dennis Johnston made a comment about having an interest in a permit during the hearing in Landfill Closure I, he was referring to the Certificate.

38. Ms. Johnston testified that she believed faxes from Amy Shulund addressed to Dennis Johnston were actually sent to and received by her. She based this belief on the fax number to which they were sent and records of document creation, modification, and access created by her word processing program. She offered an explanation for the difference between the fax number to which the faxes were sent and the fax number listed on the Application for Transfer of Intrastate Certificate of Public Convenience and Necessity. She also testified extensively regarding her communications with WWSS and her understanding of Dennis Johnston's activities related to the Certificate. She testified that she did not see any annual reports of WWSS that had been provided to Dennis or receive any advice from him regarding the Certificate.

39. Ms. Johnston testified about telephone calls reflected on Exhibit C-39. She testified about various phone numbers that MacKenzie, Eagle Services, Reiter Industries, and the Johnstons used in various locations at various times and for various purposes. Ms. Johnston testified about her obtaining financing to start MacKenzie and about Dennis Johnston executing a quit claim deed on their house to facilitate that financing.

40. She testified that she understood WWSS to be hauling Class D material from outside of the city limits through the city to the landfill. She testified that while an

employee at BFI nothing ever came to her attention indicating that WWSS was doing something contrary to the permit. She stated that WWSS and BFI were not competing because they did not haul the same type of wastes.

41. Ms. Johnston testified that when she purchased the Certificate from WWSS she did not purchase any equipment, customer lists, or any other assets

42. Ms. Johnston testified that she did not receive any documentation from WWSS indicating that it had hauled Class D material in 1999, the year of the transfer, and that as far as she knew when the sale closed in December 1999, there had been zero hauling activity in 1999. She also testified that Nickie Eck, Commission staff person, told her that the lack of hauling during a year of transfer would not be a concern.

43. Ms. Johnston testified that she was not aware that the 1997 Annual Report filed by WWSS indicated that there had been no Class D activity in the first 11 months of 1997 and that the Certificate had been in suspension for December 1997 and the first 5 months of 1998. She also testified that she would not have been concerned about it because the Commission had approved the verified statement submitted by WWSS and allowed it to retain the Certificate. She testified that when she signed the buy/sell she had no idea that there was a possibility that the Certificate could be subject to attack on the basis of non-use.

44. Ms. Johnston testified that MacKenzie began actual operation in January 2000 and that she had customers before MSWC/BFI filed the Complaint in this matter.

45. Ms. Johnston testified that at some point she became aware that the Commission interpreted the limitation in the Certificate to prohibit the picking up of garbage outside the city limits of Billings; that Jeffrey Weldon wrote to the Commission

requesting an interpretation of the authority granted by the Certificate; and that she did not receive a response to Mr. Weldon's inquiry. She testified that she called Wayne Budt who told her that based on an informal opinion Commission staff had interpreted the limitation to prohibit picking up garbage outside of the city limits and that if she wanted a formal Commission decision she would have to take it to the Commission. She testified that her understanding was that under the staff interpretation she could not haul the kind of residential and commercial garbage that she wanted to.

46. She testified that sometime between 1977 and 1983 she became aware of a City of Billings ordinance that restricted residential garbage service in the city and that in 1988 or 1989 the ordinance was amended to prohibit commercial service except for roll-off boxes at construction sites. The amendment provided for a five-year grace period. She testified that in 2000, Ken Behling, an employee of the City of Billings Solid Waste Division, told her that the City was going to start strictly enforcing the ordinance and that it had been pretty lenient about allowing drop-box service for household cleanup.

47. She testified that she was not aware of the existence of the Certificate until 1993 when she saw a Notice of Proposed Transfer dealing with the transfer of the Certificate from Jim's Excavating to WWSS. She testified that she read the language in the notice and interpreted it to mean that a commodity could either begin or terminate in the City of Billings and then go to the landfill. She stated that she told John Whitman that if she were BFI she would be worried about the Certificate.

48. She testified that during the period she was involved in the solid waste business in the Billings area as an owner she was not aware of any private companies providing residential, commercial or roll-off service other than Yellowstone Sanitation

and D&F Sanitation. She testified that after BFI purchased D&F Sanitation there was no competition in residential, commercial or roll-off service.

GARY FEHR

49. Mr. Fehr is a truck driver employed by BFI. He was employed by Yellowstone Sanitation when it was owned by Dennis Johnston and Cherie Johnston, became an employee of BFI when Yellowstone Sanitation was purchased, and has been regularly employed by BFI since that time.

50. Mr. Fehr testified that he was not aware of any private firm hauling residential or commercial garbage to the Billings landfill in specialized garbage trucks other than BFI since BFI purchased D & F Sanitation. He stated that his awareness came from the time spent driving and from approximately 10 minutes per day that he spent at the landfill while unloading. He testified that he saw trucks and roll-offs from Jim's Excavating being unloaded at the Billings landfill and that there could have been other haulers there also.

51. Mr. Fehr testified that when he served a route in the Lockwood area he would drive through a part of the City of Billings to get to the Billings landfill. He also testified that there were areas of land surrounded by the City of Billings that were not within the city limits and that BFI had served these areas and that the number and size of these areas had been decreasing for many years.

JAY YORGASON

52. Jay Yorgason drives trucks for servicing roll-off boxes for BFI. He has worked for BFI since September, 1989. He worked in a similar capacity for Big Sky Haul-Away for a short period in 1987.

53. He testified that he was not aware of any competitor to BFI in the roll-off business since BFI purchased D & F Sanitation, and that to his knowledge from 1989 forward BFI had never lost a roll-off account to a private firm until MacKenzie began operations. He testified that he went to the Billings landfill 8 to 10 times per day and remained at the landfill about 15 minutes per time. He stated that he was aware of Jim's Excavating hauling demolition and construction waste to the Billings landfill. He stated that he was not aware of any other private firm hauling garbage to the Billings landfill but that he did not inspect every truck that unloaded there.

54. Mr. Yorgason testified that a Billings ordinance allowed only the operation of equipment to service a drop-box or roll-off box within the city and that a roll-off box could not be emptied by a vacuum truck or an air mover. He admitted that a roll-off box containing sand, dirt, or fine material of various kinds could be serviced by an air mover.

JIM SWAIN

55. Jim Swain is a Certified Public Accountant employed by Galusha, Higgins, & Galusha. He serves as the Billings' office manager and as account manager for about 500 clients. He testified that he had been acquainted with Dennis Johnston and Cherie Johnston since they had owned Yellowstone Sanitation and Big Sky Haul-Away, and that he had done accounting for those business and their personal taxes both while the Johnstons were business owners and subsequent to the sale of the businesses.

56. Mr. Swain testified that he had prepared or helped to prepare an SBA loan application for Cherie in connection with the start-up of MacKenzie, and a projected balance sheet for inclusion with the application filed to obtain approval of the transfer of

the Certificate to MacKenzie. He testified that the cash asset listed on the projected balance sheet should have been shown as a note receivable, but that the proper treatment would not have changed the financial condition of the company. He also testified that in doing work for MacKenzie he had worked only with Cherie and not with Dennis.

JOHN NELSON

57. John Nelson is employed by WWSS and has been the Billings manager since 1993. He described WWSS business as doing everything nobody else wants to do. He testified that from 1993 to 1999 WWSS had used the Certificate as authority to haul material that met the statutory definition of garbage from outside of the City of Billings through the city and on to the Billings Landfill, and from within the City of Billings to the landfill. He believed that the Certificate permitted such moves. Mr. Nelson testified that some of the material that WWSS hauled was contaminated and could not be hauled to the landfill. The environmental regulations and enforcement at the Billings Landfill have changed since 1993, and items that WWSS had previously emptied at the landfill could not be dumped there by 1999.

58. WWSS used air-movers for such hauling. Mr. Nelson testified that an air-mover could handle anything up to four inches in diameter. WWSS has never had roll-off equipment in Billings or equipment similar to that which BFI operates anywhere. A typical trip for a WWSS driver involving waste going to the landfill would consist of about 15 minutes of loading and an hour and one half to drive to the landfill, unload, and return to the point of origin.

59. Mr. Nelson further testified that he did not do any of the billing or prepare any of the reports filed with the Commission. He prepared time and material summaries and sent the information to Amy Shulund at WWSS's Spokane headquarters.

RON TIMM

60. Ron Timm is vice president for commercial loans for Rocky Mountain Bank in Billings. Mr. Timm testified that in late 1999 he had worked with Cherie Johnston for MacKenzie to obtain a loan in the amount of $41,738.50 and that the collateral for the loan was two trucks to be purchased with the proceeds and a second trust indenture on the house in which Dennis Johnston and Cherie Johnston lived. In order for the house to serve as collateral, it was necessary for Dennis Johnston to transfer his interest in the house to Cherie.

61. Mr. Timm testified that Dennis Johnston had not been involved in the transaction and that while he might have previously met Dennis at a social function, he did not recognize Dennis at the hearing.

J. D. BALCOM

62. J. D. Balcom is a mechanic and driver with MacKenzie. He has been employed by MacKenzie since January, 2000. Prior to being employed by MacKenzie, Mr. Balcom was employed as a mechanic by BFI. From September, 1999 to December, 1999, Mr. Balcom, during his non-work hours, consulted with and assisted Cherie Johnston in choosing and acquiring facilities, vehicles and equipment for MacKenzie. He testified that Dennis Johnston was not involved in the MacKenzie operation in any manner.

ELIZABETH ROSE RYDER

63. Elizabeth Rose Ryder is a clerical worker employed by BFI since 1989. She initially worked in residential area and has expanded her duties into the commercial area. Ms. Ryder considered Cherie Johnston to be very knowledgeable about BFI procedures and about the garbage industry in Billings. She considered Cherie to be second in charge. Dennis was the district manager and Cherie was the office manager at the time to which she was referring.

64. Ms. Ryder testified that while employees neither Dennis nor Cherie favored anyone going into competition with BFI. She described an incident regarding the placement of a roll-off box by Jim's Excavating outside of the Billings city limits and Dennis calling someone whom she could not identify. She also described another incident regarding an unidentified person hauling garbage with a farm truck in the Shepherd/Huntley area. The activity stopped after Dennis called someone about it.

65. Ms. Ryder testified that she saw Dennis and Cherie conversing in the office on a regular basis. She also testified that neither Dennis nor Cherie ever discussed Suhr transport with her and that they talked about Big Sky Industrial as wanting to haul BFI's water. Ms. Ryder testified that Dennis told her that there was no need to buy some unidentified permit because it was not a good permit.

DENNIS JOHNSTON

66. Dennis Johnston is the spouse of Cherie Johnston and since May 2000 an employee of MacKenzie. Mr. Johnston testified that he had over 20 years experience in the solid waste industry in Montana, primarily in the Billings area. He testified that he vigilantly watched for competition both when he was an owner of a solid waste business

and when he was employed by BFI. He testified that at one point he called Jim's Excavating and indicated that he thought Jim's was operating outside of its authority.

67. Mr. Johnston testified that he believed that after 1994 the City of Billings solid waste ordinance permitted private haulers to only service roll-off boxes at construction sites. He did not recall if he had ever made a recommendation to BFI to not purchase the Certificate, but he believed that it was not necessary for BFI to do so because BFI possessed authority to service roll-off boxes in the City of Billings. He also testified that he never recommended that BFI purchase the Certificate. He testified that he had never represented the Certificate to be lapsed or defunct, only that it was no good because of the limitations in it.

68. Mr. Johnston testified that in 1990 he requested an opinion as to how the Certificate could be used and received a letter response from Commission Staff Attorney Martin Jacobson. He testified that the response he received was the one he wanted to receive. He also testified that BFI's attorney requested an opinion as to how the Certificate could be used in 1992, but that he did not recall receiving a response. He testified that after his employment with BFI terminated he began to question the validity of Mr. Jacobson's opinion from 1990.

69. Mr. Johnston testified that he had no knowledge that either Jim's Excavating or WWSS was competing with BFI in the garbage service area in the Billings area in 1993.

70. Mr. Johnston testified extensively as to the transaction in which BFI purchased the assets of Big Sky Haul-Away and Yellowstone Sanitation.

71. Mr. Johnston testified that he was not involved with the formation of MacKenzie or the purchase of the Certificate and that after BFI terminated her employment, Cherie Johnston had told him to stay out of her business. He explained that Cherie Johnston was upset with him because she felt his actions had caused her employment by BFI to be involuntarily terminated and that from the date her employment was terminated to the date that MacKenzie purchased the certificate their marriage was strained.

72. Mr. Johnston testified that he was interested in purchasing the Certificate and that he reviewed the annual reports that WWSS had filed with the Commission. He stated that he did not see anything in the annual reports that gave him any cause for concern.

JOHN WHITMAN

73. John Whitman, a certified public accountant, is the Facility Manager for BFI in Billings, Montana. He testified that he has been employed by BFI since 1991, serving as District Accounting Manager, Operations Manager, and District Vice President before assuming his current position in 1999. He further testified that during the period from 1991 to 1998 he was considered part of the management team at BFI's Billings facility and would attend management team meetings with the District Manager, Maintenance Manager, Office Manager, Safety Manager, Operations Manager and District Accounting Manager.

74. Mr. Whitman testified that through management reports and other activities he would be aware of customers who stopped patronizing BFI and began patronizing some other Class D carrier. He also testified that Cherie Johnston was also in

a position to know if any such loss of customers took place. He stated that to his knowledge, from 1991 to 1998, no private party owning the Certificate ever took a customer form BFI. Mr. Whitman testified that, as an employee of BFI, he believed the Certificate could only be used for authority to transport roll-off boxes from construction sites in the City of Billings to the landfill, and that to his knowledge the Certificate had never been used for that purpose.

75. Mr. Whitman testified that Dennis Johnston was very vigilant about entities competing with BFI; that Dennis confronted Jim of Jim's Excavating regarding some operations of that company; that Dennis had complained to the Commission about hauling being done by Helena Sand & Gravel; and that Dennis had made other complaints to the Commission.

76. Mr. Whitman testified that Dennis Johnston had made comments about the validity of the Certificate concluding that it was invalid from non-use and that marketplace analysis reports contained information consistent with such comments.

77. Mr. Whitman testified that at one time a roll-off box had been placed near Colton Avenue in Billings and that Dennis Johnston called WWSS and in a forceful and agitated manner demanded that it be removed and stated that the Certificate was no good.

78. Mr. Whitman testified that Cherie Johnston had commented, at the time the Certificate was transferred to WWSS, that the Certificate must be a good permit.

79. Mr. Whitman also testified as to his beliefs regarding WWSS's operations, Cherie Johnston's knowledge and experience in the solid waste industry, and the necessity of using certain types of equipment to provide Class D services.

ROBERT L. DUNKER

80. Robert Dunker is a self-employed resident of Billings, Montana. He testified that he owned and operated D&F Sanitation ("D&F"), a Class D carrier, from 1970 to 1989. D&F operated in a 50 mile radius around Billings and in all of Carbon and Stillwater Counties. He testified that in 1989 BFI purchased his business and continues to lease a shop and land from him. BFI's office is situated on the land leased.

81. Mr. Dunker testified that he was not aware of the existence of the Certificate until such existence was brought up when he was selling his business to BFI. He also testified that he told BFI that the Certificate was a dead permit.

82. Mr. Dunker testified that in 1993, at the time that Jim's Excavating was purchasing the Certificate, he discussed it with Dennis Johnston and agreed that the Certificate was a dead permit or, if not, was useless because garbage had to originate or finish in the City of Billings. Mr. Dunker also testified that he told Dennis Johnston that he felt Jim's Excavating did not need the Certificate due to the nature of Jim's Excavating's business.

MAX BAUER, JR.

83. Max Bauer is the General Manager for BFI in Montana. Mr. Bauer testified that he had worked in the waste industry since 1973, that a family business, City Disposal, was sold to BFI in 1979, and that he has been continuously employed by BFI since that time. He was a District Manager from 1979 to 1994, a Divisional Vice President from 1994 to 1997, and a District Manager from 1997 to 1999 when he assumed his current position. He testified that during the time period that he was a District Manager and Dennis Johnston was a District Manager, they were peers and that

during the time he was a Divisional Vice President from 1994 through 1996, Dennis Johnston reported to him.

84. Mr. Bauer testified about the procedure used by BFI when it purchased other carriers, including the Dennis Johnston and Cherie Johnston's operations and D&F Sanitation. He testified that during both acquisitions, BFI personnel were aware of the existence of the Certificate and were told that the Certificate was inactive and subject to revocation by the Commission. He also testified that BFI did not discount the purchase price it paid to the Johnstons or for D&F Sanitation because of the existence of the Certificate. He testified that he did not believe that he had ever checked annual reports filed by owners of the Certificate to determine if any Class D activity had been reported.

85. Mr. Bauer testified that he had two or three conversations with Dennis Johnston regarding whether or not BFI should attempt to purchase the Certificate. He stated that his response in the conversations was to question the reasons for purchasing the Certificate when Dennis had represented, during the negotiations for the purchase of the Johnstons' operations, that the Certificate had never been used. He also testified that Dennis represented that even if the Certificate were valid, it was of no use because of the restrictions imposed by the City of Billings and the conclusion contained in a letter written by Martin Jacobson, Commission Staff Attorney, in 1990.

86. Mr. Bauer testified as to conversations he had with Dennis Johnston when Dennis purchased Mr. M's Disposal ("Mr. M's") but before Dennis's employment by BFI was terminated. He testified that BFI had attempted to acquire a competitor of Mr. M's, Sanitation Inc., and that Dennis would have acquired knowledge of the competitor's customers.

87. Mr. Bauer testified that BFI's filing of the Complaint in this matter when MacKenzie began operations was prompted by lack of action by the Commission.

LORI SANDRU

88. Lori Sandru, a long-time employee of the Commission, worked in the Commission's Transportation Division for 19 to 20 years until November 2001 when she transferred to the Utility Division. She testified that in the first part of 1994, as she was preparing to go on maternity leave, she prepared a policy manual to guide her replacement ("Exhibit C-57"). A part of the policy manual contained her understanding of the annual report policy for motor carriers in a sale or transfer year.

89. Ms. Sandru testified that when she worked in the Transportation Division she was responsible for reviewing annual reports. She further testified that during 1988 to 1989 if her initial review indicated a Class D carrier had not met the revenue or customer threshold she would have gone to her supervisor, Wayne Budt. If a carrier submitted a verified statement, also known as Schedule 5 to the annual report, Ms. Sandru would give it to Wayne Budt who would take it to the Commission for action. She testified that she did not make a judgment as to the adequacy of any explanation but that the Commission as a body would make such a determination.

90. Ms. Sandru testified that Commission policy was to not require a Class D carrier to show that it met either the revenue criterion or the customer criterion in a year in which the Class D certificate was sold or transferred.

NICKIE ECK

91. Nickie Eck has been employed in the Transportation Division of the Commission for over 22 years. Ms. Eck testified that she is one of two employees in the

Transportation Division, that she serves as a back-up to Wayne Budt, the Administrator, and that the two of them handle everything including initial applications, sales and transfers, and insurance compliance. She testified that in 1998 and 1999, and probably in 1997, she was responsible for handling suspensions of motor carrier certificates.

92. Ms. Eck testified that she recalled having conversations with Cherie Johnston, but that she did not recall any specific dates. She recalled speaking about compliance steps after the Commission had approved the transfer the Certificate to MacKenzie.

93. Ms. Eck testified regarding Commission procedures with respect to suspensions of authority, to a carrier's resumption of operations after the end of a suspension period, to a carrier's compliance with Commission rules and regulations, and to a carrier's commencement of operations upon the grant of new authority. She testified that she believed a carrier who held itself out as ready, willing, and able to provide service had commenced operations.

WAYNE BUDT

94. Wayne Budt testified in person, and a deposition given by him on May 20, 2002, was admitted into the record. He has been employed as Administrator, Transportation Division at the Commission since March 14, 1977. In 1993 the responsibilities for administration of Centralized Services Division were combined with those of the Transportation Division into one position. He is currently Administrator, Transportation and Centralized Services.

95. Mr. Budt testified as to policies and procedures used by staff to implement the applicable statutes and rules and regulations of the Commission. With respect to §

69-1-314(2), MCA, (the "Use-it-or-Lose-it Provision"), he testified that a carrier could establish a presumption of compliance in one of two ways: (1) file an annual report showing service to at least 20 customers in each month of a calendar year; or (2) file an annual report showing revenues of $5,000.00 or more for a calendar year. He said that a carrier could establish compliance without such a presumption by filing a signed and verified statement explaining the circumstances that a carrier contended should allow it to retain its certificate and having such statement approved by the Commission. He testified that neither he nor any other staff person made recommendations to the Commission as to the acceptability of any verified statement. Mr. Budt testified that he was not aware that any verified statement had not been approved by the Commission. He testified that staff procedure was to not require a showing of compliance with the Use-it-or-Lose-it Provision in a year in which a certificate had been transferred or suspended. He stated that this procedure had been in place since at least the early 1990's.

96. With respect to the filing of annual reports in years in which a certificate is transferred from one party ("Transferor") to another ("Transferee"), Mr. Budt testified that staff procedure was that the Transferor was not required to file an annual or termination report if the application for transfer was filed in the first quarter of the calendar year, that the Transferee was not required to file an annual report if the transfer was approved by the Commission in the last quarter of the calendar year, and that in all other cases both the Transferor and the Transferee were required to file annual reports. He stated that this procedure had been in practice since before he became a Commission employee in 1977.

97. With respect to § 69-12-404, MCA, ("Suspension Provision"), Mr. Budt testified that as Transportation Division Administrator he interpreted the limitation to be that a carrier could have no more than 2 consecutive six-month suspension periods, but that after an intervening period of activity, the carrier could seek additional suspension periods. He testified that the practice had been to allow no more than 12 months' of suspension in any 24-month period.

98. Mr. Budt also testified as to his understanding of the rule-making dockets referred to as Landfill Closure I and Landfill Closure II.

MARTIN JACOBSON

99. Martin Jacobson testified that he had been employed as a staff attorney for the Commission for 13 years and 9 months and that he had earned an undergraduate degree in political science and a law degree. He testified that he currently spent two and a half percent of his time on transportation matters but that at other times he had spent as much as 100 percent of his time on transportation.

100. Mr. Jacobson testified that he was not aware of the Commission ever revoking a Class D certificate for failure to transport garbage on a regular basis and that he was not aware of any audit by the Commission of an annual report filed by a Class D carrier.

101. Mr. Jacobson stated that the practices regarding suspensions and annual reports had been implemented a multitude of times but that those practices were not contained in any written rule. He testified that the suspension policy was a practice that the Commission had applied at least since 1990 when he became a legal counsel to the Commission.

102. Mr. Jacobson testified that to the extent the Commission or Commission staff waives the requirement for a motor carrier to file an annual report it is not in accordance with § 69-12-407, MCA.

103. Mr. Jacobson testified that he had written a letter in 1990 in which he opined that the Certificate could not be used to transport garbage picked up outside of Billings to the Billings' landfill, and that within a few months he had written a second opinion about another certificate that he felt could be interpreted contrary to the interpretation in the first letter.

104. Mr. Jacobson testified that he felt ARM 38.3.1203 specified what a carrier needed to do to comply with ARM 38.3.1201-1202 and that he would have so advised the Commission. He further testified that he did not recall having advised the Commission regarding any verified statement made pursuant to ARM 38.3.1204.

105. Mr. Jacobson testified that his understanding of policy regarding required activities and documentation by a Class E carrier in a transfer year was not in writing and that the decision to apply the same policy to Class D carriers was not in writing. He testified that notice of requests for suspension by Class D carriers would be provided in the Commission's weekly agenda but would only go to those carriers, utilities, attorneys, and others who subscribe to the weekly agenda and that this notice was not the same as notice procedure used when a carrier sought to initiate or expand Class D authority.

106. Mr. Jacobson testified about the rule-making procedures referred to as Landfill Closure I and Landfill Closure II and about his opinion of the effect of either alternative in the proposed rule in Landfill Closure I. He also testified that the result of

Landfill Closure I did not totally overrule his second opinion letter, but rather was a further modification of it.

107. Mr. Jacobson testified that he did not send his first opinion letter (regarding the transportation movements permitted by the Certificate) to the then Certificate holder or to any subsequent holder of the Certificate.

ERIC STEINGRUBER

108. Eric Steingruber is a Vice President and Senior Business Banking Officer for Wells Fargo Bank in Missoula Montana. He was employed by First Bank in Billings from 1998 until October 2001. He testified that in December 1999 he began dealing with Cherie Johnston who was acting on behalf of MacKenzie. He testified that First Bank made an SBA loan to MacKenzie and about the circumstances of that transaction.

SUE WEINGARTNER

109. Sue Weingartner is an Association Management Executive for MSWC and several other associations. She testified that the purpose of MSWC is to protect, preserve, and represent the interests of the solid waste industry in Montana; that MSWC has 20 members; that the number of members has been generally constant since 1996; and that BFI is a member of MSWC.

110. Ms. Weingartner testified that representatives of the MSWC gathered information from the Commission that had been filed by Class D carriers, that MSWC was primarily interested in information containing the annual revenues of its members for dues assessment purposes, but that MSWC sometimes collected information on other carriers.

111. Ms. Weingartner testified that MSWC represented the interests of its members before the legislature and the Commission and that MSWC had specifically intervened in the City of Helena issue related to city hauling from the transfer station to the landfill, the City of Culbertson issue, the City of Melstone issue, the Rozell matter and the tire issue in Polson.

AMY SHULUND (By Deposition)

112. Amy Shulund is Secretary-Treasurer of WWSS. Ms. Shulund testified that WWSS had offices in Idaho, Montana and Washington and that she generally describes WWSS as an industrial service maintenance contractor. Ms. Shulund testified that WWSS provided services to primarily industrial clients but also provided limited service to residential customers. She testified that the major clients of WWSS in the Billings area included Exxon, Cenex, Montana Rail Link, Yellowstone Energy Limited, Rosebud Energy Corp. and construction companies.

113. Ms. Shulund testified that WWSS owned and operated industrial vacuum trucks, Department of Transportation certified liquid pumper trucks, and a water blaster in the Billings area. She testified that prior to 1996 or 1997 WWSS focused on vacuum work and subsequent to then it focused on liquid pumper work. She further testified that WWSS had never owned any trucks in the Billings area other than those described.

114. Ms. Shulund testified that WWSS would pick up sand, dirt, grain, insulation, and construction materials with the vacuum trucks and haul it to and dump it at the Billings landfill. She also testified that during the period from 1993 to 1999 if something wet was vacuumed, WWSS would add absorbent material and then dump it at the Billings landfill. She testified that WWSS preferred for its clients to instruct it as to

the disposal of material which was transported and that some items which could not be disposed of at the Billings landfill were disposed of at other places. Ms. Shulund testified that except for records needed for tax purposes, WWSS no longer possessed any records regarding its Class D activities and that she could not name the specific customers for whom WWSS had provided Class D service in specific time periods.

115. Ms. Shulund testified that WWSS acquired its Class D authority because more than one entity, including BFI, asserted that WWSS was operating illegally without such authority. She further testified that she understood the authority to permit the transport of Class D material if the transport passed through Billings and that she was not aware of any contrary opinion. She stated that the entire purpose of acquiring the Certificate was to be legal in hauling material to the Billings landfill. She testified that she did not recall anyone ever questioning the validity of the Certificate during the time that WWSS owned it.

116. Ms. Shulund testified that WWSS calculated its Class D revenue based on projects that resulted in material being hauled to the Billings landfill. In some cases the Class D revenue was a percentage of total revenue for a larger job; in other cases it was the total revenue for a job. She was unable to state the number of customers or jobs that would have been reflected by the reported Class D revenue. She testified that it did include more than five in at least one year.

117. Ms. Shulund testified that at the request of WWSS, the Commission approved suspension of the certificate from December 1, 1997 to June 1, 1998. She also testified that WWSS resumed providing Class D service in June 1998. She further

testified that in 1998, someone from BFI contacted her to inquire if the Certificate was for sale.

118. Ms. Shulund provided extensive testimony about the transaction between WWSS and MacKenzie that resulted in the transfer of the Certificate. As the identity of the persons involved and the timing of various conversations are not relevant to the validity of the Certificate, that testimony is not recounted here.

V. Agreed and Stipulated Facts

119. The Billing Landfill is located outside the city limits of Billings and has been at the same location since at least 1967.

120. Interstate 90 runs for several miles through the city limits of Billings and is a major transportation route to the Billings Landfill.

121. Cherie and Dennis Johnston were shareholders in a corporate entity that owned and operate a garbage service in the Billings, Montana area from 1981 through June 1988.

122. Cherie and Dennis Johsnston sold their Billings area garbage service business and Class D certificates to BFI in July 1988.

123. Cherie and Dennis Johnston continued to work for BFI until early March 1998.

124. Dennis Johnston served as BFI's District Manager and/or Operations Manager for the Billings area during his employment by BFI.

125. Cherie Johnston initially served as BFI's Office Manager and then as BFI's Safety Manager for the Billings area during her employment by BFI.

126. On August 30, 1990, Dennis Johnston, on behalf of BFI, wrote Martin Jacobson of the Commission to ask about the "proper interpretation" of the authority under the Certificate.

127. On September 13, 1990,[16] Martin Jacobson responded to Dennis Johnston, BFI's District Manager, by letter. Mr. Jacobson's September 13, 1990 letter interpreted the authority and stated that "the actual transportation of garbage must commence (originate) within the city of limits of Billings, regardless of where it ends (terminates) or end within the city limits of Billings, regardless of where it commences."

128. Dennis Johnston began to question the correctness of Martin Jacobson's September 13, 1990 opinion letter shortly after he ended his employment by BFI in late March 1998.

129. Cherie Johnston incorporated MacKenzie on May 29, 1998.

130. On October 29, 1998, MacKenzie's attorney Jeffrey Weldon wrote a letter to Wayne Budt, Administrator of the Commission's Transportation Division, asking for an opinion about the territorial limits in the Certificate.

131. In November 1998, Commission Staff Attorney Denise Peterson prepared a draft response to Mr. Weldon's October 29, 1998 letter but the draft response was never sent.

132. In November or December 1998, Cherie Johnston was told by Wayne Budt that Martin Jacobson's September 13, 1990 letter was still valid and in effect.

[16] The identification of Agreed Facts in the Consolidated Proposed Prehearing Order of Complainants BFI Waste Systems and Montana Solid Waste Contractors, Inc., which was accepted by MacKenzie in the Proposed Prehearing Order of MacKenzie Disposal Inc., listed this date as September 11, 1990. Exhibit C47, the letter referred to, establishes the correct date to be September 13, 1990.

Based on her conversation with Mr. Budt, Cherie Johnston decided not to purchase the Certificate from WWSS in late 1998.

133. Based in part on conversations in 1999 with Wayne Budt and Martin Jacobson, Cherie Johnston decided to purchase the Certificate from WWSS.

134. Agents of MacKenzie and WWSS signed an asset purchase agreement on August 23, 1999. MacKenzie agreed to purchase the Certificate from WWSS for $20,000.00.

135. MacKenzie and WWSS filed a transfer application for the Certificate with the Commission on August 25, 1999.

136. The Exxon and Cenex refineries are located outside the city limits of Billings.

VI. Discussion

DOES MSWC HAVE STANDING TO PURSUE THIS MATTER?

137. MacKenzie has challenged the standing of MSWC to be a complainant in this matter. MSWC/BFI alleged, "[MSWC] . . . is a statewide association of private businesses providing solid waste, transportation, recycling, and disposal services to the citizens of Montana and has a general interest in the proper administration of the laws and rules governing the issuing and retaining of Class D certificates." 2nd Amended Complaint at ¶ 2. MacKenzie denied the allegation. Answer at ¶ 3. MacKenzie also asserted as an affirmative defense that MSWC did not have standing. Answer at pp. 9-10. The parties were specifically asked to brief this matter in their initial briefs. Tr. at 1608.

138. MSWC/BFI chose not to brief this issue but did include a discussion in a Memorandum of Law ("MSWC/BFI Mem.") that they attached to their initial brief. First, MSWC/BFI assert that "The Commission ruled that MSWC had standing early in the hearing." MSWC/BFI Mem. at p. 13. Second, citing *Montana Envtl. Info. Ctr. v. Dep't of Envtl. Quality*, 1999 MT 248, 296 Mont. 207, 988 P.2d 1236 (1999), MSWC/BFI assert that MSWC is similar to the MEIC. *Id.* MSWC/BFI argue that as the MEIC had standing to protect against threatened injury to environmental interests, MSWC has standing to protect its members' economic interests. *Id.*

139. MacKenzie asserts that MSWC does not meet the requirements established by the Montana Supreme Court for an association to have standing. MacKenzie Br. at p. 29. MacKenzie claims that MSWC has not alleged that it represents any interests of its members that are derivative in nature and that it has offered no evidence that the interests it seeks to protect are of the sort that an individual member can assert. *Id.*

140. A party must meet a two-pronged test to establish standing: (1) the party must allege past, present or threatened injury to a property or civil right; and (2) the alleged injury must be distinguishable from the injury to the public generally. *Gryczan v. State*, 283 Mont. 433, 442-3, 942 P.2d 112, 118 (1997). A potential economic injury is sufficient to establish standing. *Missoula City-County Air Pollution Control Bd. v. Bd. of Envtl. Review*, 282 Mont. 255, 262, 937 P.2d 463, 468 (1997).

141. An association has standing to appear as a party on behalf of its members in Montana state courts "when (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's

purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *In the Matter of the Adjudication of the Dearborn Drainage Area*, 234 Mont. 331, 336, 766 P.2d 228, 231 (1988), *overruled on other grounds by In re Adjudication of Existing Water Rights*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

142. The evidence, and reasonable inferences from that evidence, establish that MSWC has standing to pursue this matter. MSWC charges member dues based on a member's gross revenues. Tr. at p. 1405. Although no evidence was presented on the impact of MacKenzie on BFI's revenues because BFI's standing was not challenged, Tr. at p. 994, it can be inferred that BFI's revenues have decreased. BFI is a member of MSWC. Tr. at p. 1404. MacKenzie is not a member of MSWC. Tr. at p. 1410. A logical inference from these facts is that MSWC revenue has decreased or is threatened to decrease. Although this basis for standing was not alleged by MSWC, pleadings are deemed to be amended to conform to proof received without objection. *Donnes v. Orlando*, 221 Mont. 356, 364, 720 P.2d 233, 238 (1986).

143. Since MSWC can establish its standing based on a particular injury or threatened injury, it is not necessary to decide whether or not it has standing as an association representing its members. The Commission declines to rule on this issue.

HAS ANY HOLDER OF THE CERTIFICATE VIOLATED § 69-12-314(2), MCA, ARM 38.3.1201, 1202, OR 1203 OR ANY OTHER OF THE COMMISSION'S RULES OR ORDERS OR PROVISION OF CHAPTER 12, TITLE 69, MCA, SUBSEQUENT TO JANUARY 14, 1997?

144. In Section I, Paragraph 15, *supra*, the Commission concluded that § 69-12-314(2), MCA, provides the Commission with a specific cause for which a certificate may be revoked. ARM 38.3.1201, 1202, and 1203 are properly promulgated and adopted

administrative rules implementing § 69-12-314(2), MCA. In Section II, Paragraph 31, *supra*, the Commission concluded that it may only consider the Certificate holders' actions taking place after January 14, 1997.

145. Section 69-12-314(2), MCA, provides, "A motor carrier may not possess a Class D motor carrier certificate unless the motor carrier actually engages in the transportation of garbage on a regular basis as part of the motor carrier's usual business operation." Section 69-12-407(3), MCA, directs the Commission to "require the holder of a Class D motor carrier certificate to provide sufficient information to show that the carrier is entitled to possess the Class D motor carrier certificate under the requirements of 69-12-314."

146. To implement these statutory sections, the Commission has adopted four administrative rules, ARM 38.3.1201, 1202, 1203, and 1204. ARM 38.3.1201 defines usual business operation. ARM 38.3.1202 defines regular basis. ARM 38.3.1204 provides a safe harbor by which a motor carrier can demonstrate that it is complying with § 69-12-314(2), MCA. ARM 38.3.1204 provides a procedure by which a motor carrier that cannot meet the safe harbor provisions can request that the Commission determine that the carrier is complying with § 69-12-314(2), MCA.

147. In 1997, WWSS held the Certificate. For the first eleven months of the year the Certificate was in active status. Pursuant to a request from WWSS, the Commission authorized a suspension of the Certificate for a 6-month period beginning December 1, 1997. WWSS did not meet the safe-harbor criteria of ARM 38.3.1203 for 1997. WWSS submitted a verified statement to the Commission pursuant to ARM

38.2.1204. On June 22, 1998, at a regularly scheduled business meeting, the Commission voted to accept the verified statement which had been submitted by WWSS.

148. WWSS complied with the applicable administrative rule. In the exercise of its discretion, the Commission determined that WWSS's explanation of its failure to meet the safe-harbor criteria was acceptable and allowed WWSS to retain the Certificate. MSWC/BFI assert that "[t]he Commission staff has in essence reduced the Commission requirements to cinders." MSWC Br. at 12. In making this assertion, MSWC/BFI ignore that staff made no decision. A discretionary decision of an administrative agency is subject to examination only for abuse of discretion. *Cf. In re Meidinger*, 168 Mont. 7, 16, 539 P.2d 1185, 1190 (1975). There has been no showing that the Commission abused its discretion in deciding to accept WWSS's verified statement for 1997.

149. In 1998, WWSS held the Certificate. The Certificate was suspended for the first five months of 1998. On its Annual Report for 1998 WWSS reported revenue from Class D operations of $10,601.54. Ex. C-14. WWSS met one of the safe-harbor criteria of ARM 38.3.1203.

150. MSWC/BFI contend that WWSS never had any regulated Class D revenue. MSWC/BFI Resp. at 22. MSWC/BFI first argue that WWSS's hauling was merely incidental to other service. *Id.* MSWC/BFI then argue that any hauling of Class D material by WWSS was illegal because it did not involve construction roll-off service. *Id*. at 22-3.

151. Whether or not transportation is incidental transportation is determined by the primary business test. ARM 38.3.1001(3). Transportation is incidental to a principal business when the transportation is in furtherance of, in the scope of, and subordinate to

that primary business. ARM 38.3.1001(2). To be merely incidental transportation the activity must meet all three of the requirements set forth in ARM 38.3.1001(2). "Subordinate to" means lesser than, minor in comparison to, dependent on, existing because of, and controlled by. It does not include transportation which is a significant enterprise itself. ARM 38.3.1002(1)(d).

152. John Nelson testified that for an average job an employee would spend about 15 minutes loading and 1½ hours transporting the material. Tr. at 487. WWSS based its charges to customers on the time spent. Shulund Dep. at 33. Prior to WWSS's acquisition of the Certificate in 1993, other entities, including BFI asserted that WWSS was engaged in illegal hauling of Class D material. Shulund Dep. at 45. In some instances WWSS's Class D revenue was a percentage of revenue from a larger project; in other cases the Class D revenue represented the total revenue from a project. Shulund Dep. at 59-60. Based on the relative amounts of time spent on various activities and on the magnitude and significance of the revenues, the transportation engaged in by WWSS in hauling materials to the Billings landfill was not subordinate to WWSS principal business activity. The activity engaged in by WWSS was not incidental transportation.

153. MSWC/BFI assert that the Certificate did not authorize any transportation originating outside of the City of Billings and terminating at the Billings landfill. MSWC/BFI Resp. at 23. They base this assertion on the preliminary, informal comments of Martin Jacobson contained in a letter to BFI District Manager, Dennis Johnston dated September 13, 1990, (Ex. C-47). During the time that it held the Certificate, WWSS believed that the Certificate authorized transportation of Class D material from outside of

the city to the Billings landfill so long as the movement went through the City of Billings. Shulund Dep. at 48.

154. During the applicable period, no formal decision or rule regarding the extent of the authority granted by the Certificate existed. Different individuals had different opinions and views.[17] Had a complaint been filed during the applicable period, Commission staff would likely have asserted that the Certificate did not authorize movement of Class D material from outside of Billings through the City of Billings to the Billings landfill. Tr. at p. 1221-2. However, informal opinions and staff assertions do not establish binding legal positions.[18] Interpretations in opinion letters and enforcement guidelines lack the force of law. *Cf. Christensen v. Harris County*, 529 U.S. 576 (2000). Only the Commission, through adjudication in a contested case or through rule-making can establish a binding legal position.

155. Consistent with its adoption of ARM 38.3.130, the Commission determines that during the applicable period, transport of Class D material from outside the City of Billings into the City and then to the Billings landfill was authorized by the Certificate.

156. In August 1999, WWSS applied for authority to sell and transfer the Certificate to MacKenzie. Pursuant to instructions from Commission staff, WWSS filed an Annual Report for that portion of the year ending on the last day of the month preceding the application for transfer. WWSS showed no Class D activity in the first

[17] On June 17, 1999, the Commission caused to be published a Notice of Public Hearing on a proposed rule regarding the effect of "landfill closure" provisions. In that Notice, the rationale for the proposed rule was stated , "The proposed rule is reasonably necessary to resolve conflicting interpretations, views, and opinions regarding the meaning and effect of the PSC's Class D 'landfill closure provision,' . . . ." 199 MAR 12, p. 1291B.

[18] The September 13, 1990 Martin Jacobson letter cautions: "My preliminary or informal comments follow. Please note that any formal opinion would have to be based on some formal action and Suhr's opportunity to be heard on the matter."

seven months of 1999. Commission staff policy is to not require a verified statement from a carrier not meeting the safe harbor criteria for a year in which a certificate is transferred. The administrative construction of the statute that a verified statement is not required in a transfer year is one of long standing which has been applied since the early 1990's. Budt Dep. at pp. 54-57.[19] MSWC/BFI assert that the policy is contrary to the statute. MSWC/BFI Br. at 9.

157. In adopting administrative rules to implement changes to § 69-12-314, MCA, the Commission sought to establish general guidelines by which the Commission could review a carrier's operation for compliance without subjecting the carrier to onerous reporting requirements and "avoid having to closely scrutinize every Class "D" carrier on a case-by-case basis." *See* 12 MAR 1718 (6/26/1980). The adoption of those guidelines created a scheme in which activity was looked at on a calendar-year basis to determine if a Class D carrier complied with § 69-12-314, MCA.

158. Commission staff recognized problems that arose in applying annual guidelines to a carrier that could not operate for an entire calendar year, as in a transfer year. Commission staff also recognized that a carrier would not normally purchase a certificate that required future compliance with the rules unless it intended to operate in such a manner that would allow it to retain the certificate. Such a situation would establish other circumstances that allowed retention of a Class D certificate. Commission staff chose to implement the rules by not requiring a verified statement in a transfer year.

159. An agency's interpretation of its own rule is valid unless it is plainly inconsistent with the spirit of rule and so long as it lies within the range of reasonable interpretation permitted by the wording. *Juro's United Drug v. Mont. Dep't of Revenue*,

[19] On motion of MSWC, Wayne Budt's Deposition was admitted into the record.

2004 MT 117, ¶ 12, 321 Mont. 167, ¶ 12, 90 P.3d 388, ¶ 12 (2004) (*citing Easy v. State Dep't of Natural Res. & Conserv.*, 231 Mont. 306, 309, 752 P.2d 746, 748 (1988). The Commission staff's interpretation of its rule is a reasonable interpretation permitted by the wording of the regulations.

160. No holder of the certificate violated § 69-12-314(2), MCA, ARM 38.3.1201, 1202, or 1203 or any other of the Commission's rules or orders or provision of Chapter 12, Title 69, MCA, subsequent to January 14, 1997.

MAY THE COMMISSION REVOKE A CARRIER'S CLASS D CERTIFICATE BASED ON THE ACTIVITIES OF A PRIOR HOLDER OF THE CERTIFICATE IF NO COMPLAINT OR REVOCATION PROCEEDING IS COMMENCED AT THE TIME THE TRANSFER IS AUTHORIZED?[20]

161. MSWC/BFI assert that the Commission may revoke the Certificate held by MacKenzie based on the actions of WWSS (or prior holders). MSWC/BFI Br. at 26. MSWC/BFI contend: (1) Montana law authorizes such revocation; (2) precedent in other jurisdictions confirms a commission's authority to revoke for past violations; (3) policy reasons require that grounds for revocation not be limited to the conduct of a current owner of a certificate; (4) the Commission has previously revoked certificates based on past non-compliance; and (5) in this case, an "innocent purchaser" exception does not apply. MSWC/BFI Br. at 26-32.

162. MacKenzie asserts that when the Commission approves the transfer of a certificate that is in good standing at the time of transfer, the certificate commences a new

[20] The Hearings Officer requested the parties to brief this issue. Tr. at 1607-08. The Commission's determinations with respect to the statute of limitations and the lack of violation by WWSS render this question moot. However, if the Commission's order in this matter is appealed, and if a reviewing court were to conclude the Commission erred with respect to either the statute of limitations or the lack of violation, the determination of this issue provides an alternate ground for the Commission's decision.

life and activities of past owners are not chargeable against the new owner. MacKenzie Br. at 34.

163. Although MSWC/BFI assert that Montana law authorizes the Commission to revoke a motor carrier's certificate based on the acts of a prior owner, they point to no specific language. A clear and careful reading of the applicable statutes suggests that the Commission does not have such authority. Section 69-12-210(2), MCA, provides, ". . . upon a finding that a motor carrier has violated any of the commission's rules or orders or any provision of this chapter, the commission may suspend or revoke the motor carrier's certificate of operating authority . . . " (emphasis added). The structure of the sentence clearly contemplates that the violating motor carrier and the owner of the certificate (or a lessee operating under the certificate with the owner's authority) are the same person.

164. Section 69-12-327(1), MCA, provides, "If it appears that a certificate holder is violating or refusing to observe any of the commission's orders or rules or any provision of Title 69, as amended, the commission may issue an order to the certificate holder to show cause why the certificate should not be revoked." (Emphasis added). Both the description of the violator (the certificate holder) and the present tense (is violating or refusing) indicate that the legislature contemplated the commission would hold a person responsible for his own acts.

165. MSWC/BFI cite numerous cases from other jurisdictions for the proposition that a license or permit can be revoked based on the actions of a prior owner or holder. For the reasons discussed below, the Commission finds that none of those cases are persuasive with respect to Montana law and the Commission's authority.

166. *Furniture Capital Truck Lines, Inc. v. Pub. Serv. Comm'n*, 65 N.W.2d 303 (Mich. 1954), does not stand for the proposition that a certificate may be revoked based on the actions of a prior owner. In that case, the Michigan commission revoked authority to transfer a certificate[21] and then canceled the certificate based on the actions of the certificate holder. *Furniture Capital*, 65 N.W.2d at 304. The court affirmed the revocation of the authority to transfer but reversed the cancellation of the certificate. *Furniture Capital*, 65 N.W.2d at 308-09.

167. *Olson Transp. Co. v. Pub. Serv. Comm'n*, 163 N.W.2d 213 (Mich. 1968), involved the Michigan commission's modification of an existing certificate, not the revocation. A carrier held a general commodities certificate, which pre-dated the development of transportation of petroleum in bulk. *Olson Transp. Co.*, 163 N.W.2d at 216. The carrier never transported petroleum in bulk. *Olson Transp. Co.*, 163 N.W.2d at 217. The carrier transferred the certificate to Olson who initiated transportation of petroleum in bulk. *Olson Transp. Co.*, 163 N.W.2d at 218. The commission determined that at the time of transfer the transferor had no right to transport bulk petroleum because such authority had lapsed by non-use and failure of the carrier to hold itself out to the public for such transportation. *Olson Transp. Co.*, 163 N.W.2d at 218. The commission's decision to modify the certificate was made pursuant to a Michigan statute granting the commission the authority to revoke, suspend, alter, amend or modify any certificate issued by it. *Olson Transp. Co.*, 163 N.W.2d at 214. Montana statutes do not grant similar authority to the Commission.

[21] Michigan law allowed a party to the transfer proceeding to petition for rehearing within 30 days. *Furniture Capital*, 65 N.W.2d at 307.

168. Likewise, *Lund v. United States*, 319 F. Supp. 552 (D. Colo. 1970), involved the modification of a certificate by the Interstate Commerce Commission (ICC). The ICC determined that the language in the certificate did not reflect the intent with respect to the scope of a grand-fathered certificate. The court stated that the broad ICC-enabling statute authorized the ICC to correct inadvertent ministerial errors. *Lund*, 319 F. Supp. at 555. The enabling statute for the Commission is not as broad as that for the ICC. There is no ministerial error to be corrected.

169. *Tri-State Outdoor Media Group v. Iowa Dep't of Transp.*, 2002 Iowa App. LEXIS 304 (Iowa Ct. App. March 13, 2002)[22], involved the revocation of a permit for a non-conforming billboard when the billboard was modified without a permit. The regulation in question provided, "A new permit is required from the department prior to the reconstruction of modification of an advertising device subject to the permit provisions of this rule. . . . c. Reconstruction or modification of an advertising device prior to the issuance of the required permit shall result in revocation of any permit that has been issued for the advertising device and removal of the advertising device . . . ." *Tri-State Outdoor Media Group*, 2002 Iowa App. LEXIS at *7. The court noted that the underlying purposes of the statute which the regulation was implementing included the removal of all non-conforming billboards. *Tri-State Outdoor Media Group*, 2002 Iowa App. LEXIS at *18.

[22] A Notice at the beginning of the decision states, "NO DECISION HAS BEEN MADE OF PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION OF THE COURT OF APPEALS MAY NOT BE CITED BY A COURT OR BY A PARTY IN ANY OTHER ACTION."

170. The statute and the regulation involved in *Tri-State Outdoor Media Group*, unlike the statutes and regulations applicable in this case, are directed at a thing (advertising device) and are mandatory rather than discretionary.

171. MSWC/BFI assert that it would be unsound public policy to limit the Commission's enforcement power to actions of the current owner of a certificate. MSWC/BFI Br. at 28. They argue such a result would significantly curtail the Commission's enforcement powers, erode public confidence in those powers, and be unfair to other carriers. MSWC/BFI Br. at 28. MSWC/BFI further assert that such a result is particularly egregious because the Commission does not apply the dormancy principle to consideration of transfer applications and that such a practice will result in the resurrection of dormant certificates. MSWC/BFI Br. at 28-30.

172. MacKenzie suggests that public policy requires stability in the validity of certificates and that carriers should not be in constant jeopardy of complainants requesting revocation based on alleged actions of prior owners. MacKenzie Br. at 34.

173. The Commission recognizes the potential validity of both policy arguments. The legislature has directed the Commission to "encourage a system of common carrier motor transportation within the state for the convenience of the shipping public." § 69-12-202, MCA. The Commission determines that certainty in the validity of a certificate will promote stability and foster investment-backed decisions which will appropriately encourage a common carrier motor transportation system.

174. MSWC/BFI cite *In the Matter of Galt*, 196 Mont. 534, 644 P.2d 1019 (Mont. 1982) and *In the Matter of James Jones*, PSC Docket No. T-00.50.COM, Order No. 6516 (July 8, 2002) as cases demonstrating the Commission's authority to revoke a

certificate based on the actions of a prior owner. MSWC/BFI Resp. at 5 and MSWC/BFI Br. at 30-31.

175. *In the Matter of Galt* does not stand for the proposition for which it was cited.[23] In that case Galt applied for authority to transfer a certificate to Mintyala. *In the Matter of Galt,* 196 Mont. at 536, 644 P.2d at 1020. Certain interested parties filed a motion to quash the hearing and a motion to invalidate the certificate. *In the Matter of Galt,* 196 Mont. at 537, 644 P.2d at 1020. After initially declaring the certificate null and void as to points beyond the municipal limits of Stanford, Montana, on reconsideration the Commission granted Galt authority to transfer the certificate to Mintyala. *In the Matter of Galt,* 196 Mont. at 537, 644 P.2d at 1020. Before the transfer took place, the First Judicial District Court temporarily stayed the transfer. *In the Matter of Galt,* 196 Mont. at 537, 644 P.2d at 1021. Ultimately the District Court declared the certificate to be null and void for all purposes. *In the Matter of Galt,* 196 Mont. at 537, 644 P.2d at 1021. The Supreme Court affirmed the decision of the District Court. *In the Matter of Galt,* 196 Mont. at 540, 644 P.2d at 1022. At the time the certificate was revoked, it was owned by Galt, the party responsible for the acts causing it to be invalid.

176. Likewise, *In the Matter of James Jones,* does not stand for the proposition for which it is cited. In that case, the certificate was owned by Jones and leased to Rost. *In the Matter of James Jones,* PSC Docket No. T-00.50.COM, Order No. 6516 at ¶ 2. Competing carriers (including BFI)[24] filed a complaint against Jones. *In the Matter of*

[23] If anything, *In the Matter of Galt,* 196 Mont. 534, 644 P.2d 1019 (Mont. 1982), demonstrates the infirmities in the procedure MSWC/BFI have chosen to implement. BFI intervened in the proceeding in which the Commission authorized the transfer of the Certificate to MacKenzie. When BFI's protest was dismissed, BFI, unlike the protestants in Galt, did not appeal or seek a stay of the transfer. Rather BFI allowed the transfer to take place and MacKenzie to begin operations before initiating this action.

[24] BFI later transferred the authority for the area in question and withdrew from the action.

James Jones, PSC Docket No. T-00.50.COM, Order No. 6516 at ¶ 1. The Commission determined that Jones had violated its regulations regarding the filing of annual reports. *In the Matter of James Jones*, PSC Docket No. T-00.50.COM, Order No. 6516 at ¶¶ 12-14. The Commission revoked the certificate owned by Jones based on the actions of Jones. *In the Matter of James Jones*, PSC Docket No. T-00.50.COM, Order No. 6516. To protect Rost, the lessee of the certificate, the revocation was effective 60 days after the service date of the order. The delay in the effectiveness of the order gave Rost time to file an application for a certificate of public convenience and necessity.

177. The Commission determines that the legislature has not granted it authority to revoke a motor carrier's certificate of authority based on the actions of a prior owner of the certificate when no action challenging the validity of the certificate was pending at the time the Commission authorized transfer of the certificate to the motor carrier. The Commission may not revoke the Certificate owned by MacKenzie based on the actions of WWSS or any other prior owner of the Certificate.

VII. Findings of Fact

178. All introductory statements that can properly be considered findings of fact and that should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

179. As of the date that the complaint in this matter was filed, the Commission had not revoked the Certificate.

180. MSWC has suffered or may suffer economic injury.

181. WWSS held the Certificate in 1997. WWSS filed a verified statement as required by ARM 38.3.1204 for its 1997 operations. The Commission accepted WWSS's verified statement for 1997.

182. WWSS had $10,601.54 of Class D revenue in 1998. The transportation activities required to generate this revenue were not subordinate to WWSS's primary business activity.

183. WWSS transported Class D material from outside of the City of Billings through the City to the Billings landfill in 1998.

184. Since the early 1990's, the Commission has applied an administrative construction of statutes and regulations such that in a year a Class D certificate is transferred neither the transferor nor the transferee is required to meet the safe harbor criteria of ARM 38.3.1203 or file a verified statement pursuant to ARM 38.3.1204.

185. The legislature reenacted § 69-12-314, MCA, in 1997.

186. At the time the Commission authorized the transfer of the Certificate from WWSS to MacKenzie, no action challenging the validity of the Certificate was pending.

VIII. Conclusions of Law

187. All findings of fact that can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this Order are incorporated herein as conclusions of law.

188. A Class D certificate of public convenience and necessity is valid until it is revoked by the Commission, unless the certificate holder violates § 69-12-402, MCA.

189. In an action under § 69-12-210, MCA, where there is no evidence of

concealment of facts by fraud, the Commission is limited to considering activities taking place within three years of the date of the filing of a complaint.

190. MSWC has standing to pursue this action.

191. WWSS complied with all rules and regulations of the Commission and applicable statutes for calendar year 1997.

192. The Class D revenue reported by WWSS for 1998 was not the result of incidental transportation.

193. The Certificate authorized the transportation of Class D material from outside of Billings through the City and then to the Billings landfill.

194. WWSS complied with all rules and regulations of the Commission and applicable statutes for calendar year 1998.

195. WWSS complied with the Commission's practical construction of § 69-12-314, MCA, in 1999.

196. No holder of the certificate violated § 69-12-314(2), MCA, ARM 38.3.1201, 1202, or 1203 or any other of the Commission's rules or orders or provision of Chapter 12, Title 69, MCA, subsequent to January 14, 1997.

197. The Commission may not revoke the Certificate owned by MacKenzie based on the actions of WWSS or any other prior owner of the Certificate.

198. The Certificate is valid and in good standing.

Order

For the reasons stated above, the Complaint of MSWC/BFI is dismissed, with prejudice.

All pending objections, motions, and arguments not specifically ruled on in this Order are denied, to the extent that such denial is consistent with this Order.

Done and dated this 5th day of October 2004, by a vote of 4 to 1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
BOB ROWE, Chairman

_____
THOMAS J. SCHNEIDER, Vice Chairman
(voting no)

_____
MATT BRAINARD, Commissioner

_____
GREG JERGESON, Commissioner

_____
JAY STOVALL, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order, Number 6492c, in Docket T-00.4.COM has today been sent to all parties listed below.

MAILING DATE: October 14, 2004

FOR THE COMMISSION

FIRST CLASS:

MacKenzie Disposal Service, Inc.
980 Gold Dust Circle
Billings, MT 59105

Jerome Anderson
Attorney at Law
PO Box 866
Helena, MT 59624

BFI Waste Systems of North American, Inc.
a Delaware Corp.
1501 Rodgers
PO Box 8449
Missoula, MT 59802

Frank C. Crowley
Doney & Crowley, Bloomquist & Uda, PC
PO Box 1185
Helena, MT 59624-1185

G. Steven Brown
Attorney at Law
1313 11th Avenue
Helena, MT 59601

Montana Waste Contractors Association
34 S. Last Chance Mall #1
Helena, MT 59601

AS ITS INTEREST MAY APPEAR:

Montana Consumer Counsel
PO Box 201703
Helena, MT 5920-1703